

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

COLLEEN HOPKINS,
KATHRYN DISALVO,
DOUGLAS MORRIS, Executor of the
Estate of Margaret Morris,

Plaintiffs,

v.

JOHN S. BOOTH, III,

Defendant.

16-CV-1020
DECISION AND ORDER

On December 21, 2016, the plaintiffs commenced this action. Docket Item 1. On August 21, 2017, this Court referred this case to United States Magistrate Judge Leslie G. Foschio for all proceedings under 28 United States Code Section 636(b)(1)(A) and (B). Docket Item 13.

On August 4, 2017, the defendant moved to dismiss counts two through five for failure to state a claim, Docket Item 10; on August 8, 2017, the plaintiffs responded, Docket Item 11, and filed an amended complaint, Docket Item 12; and on August 30, 2017, the defendant replied, Docket Item 15. On November 20, 2017, Judge Foschio issued a Report and Recommendation finding that the defendant's motion should be granted in part and denied in part. Docket Item 16. The parties did not object to the Report and Recommendation, and the time to do so now has expired. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Indeed, on December 4, 2017—the day objections were due—the defendant answered the amended complaint. Docket Item 17.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a de novo review of those portions of a magistrate judge's recommendation to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). But neither 28 United States Code Section 636 nor Federal Rule of Civil Procedure 72 requires a district court to review the recommendation of a magistrate judge to which no objections are raised. See *Thomas v. Arn*, 474 U.S. 140 (1985).

Although not required to do so in light of the above, this Court nevertheless has reviewed Judge Foschio's Report and Recommendation as well as the parties' submissions to him. Based on that review and the absence of any objections, the Court accepts and adopts Judge Foschio's recommendation to grant in part the defendant's motion.

For the reasons stated above and in the Report and Recommendation, the defendant's motion to dismiss for failure to state a claim, Docket Item 10, is GRANTED as to the plaintiffs' negligence per se claim in count two but is DENIED as to the plaintiffs' claims for punitive damages in count one of the amended complaint; the defendant's motion to strike is GRANTED as to the plaintiffs' exhibits one through four and is DISMISSED as moot as to exhibit five; and the defendant's motion to dismiss counts three and four is DISMISSED as moot. Count two in the amended complaint is therefore dismissed, but counts one and three are referred back to Judge Foschio for

further proceedings consistent with the referral order of August 21, 2017, Docket
Item 13.

SO ORDERED.

Dated: January 18, 2018
Buffalo, New York

s/Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE